UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

FERGUSON BROTHERS PLUMBING
AND HEATING COMPANY, INC.

Employer

and Case 9-RC-17295

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION LOCAL #24, AFL-CIO

Petitioner

and

UNITED ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING AND
PIPEFITTING INDUSTRY OF THE UNITED STATES
AND CANADA, LOCAL UNION NO. 521, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding [1/], the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[1/] Although given an opportunity to file briefs, the Intervenor failed to do so. The Employer and Petitioner timely filed briefs which I have carefully considered in reaching my decisions on the issues involved.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organizations involved claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer, a corporation, is a mechanical contractor in the construction industry operating out of Huntington, West Virginia. The record reflects and I find, in agreement with the parties, that the Employer is a construction industry employer within the meaning of Section 8(f) of the Act. The Employer currently employs approximately eight employees in the residual unit found appropriate. There is no history of collective bargaining affecting any of these employees. The Employer and the Intervenor are parties to three currently effective collective-bargaining agreements or addendums entered into pursuant to Section 8(f) of the Act currently covering approximately 10 employees. In addition, one employee is represented under a contract with the Laborers Union, which has not sought to intervene here.

Although the Petitioner seeks to represent employees in a number of specific job classifications, the record discloses that the Petitioner is seeking to represent essentially a residual unit consisting of all unrepresented construction employees employed by the Employer, excluding all office clerical employees, all other employees, and all professional employees, guards and supervisors as defined in the Act. The Intervenor agrees that such a unit is appropriate. However, the Petitioner and the Intervenor disagree as to whether Mark Whitt is currently represented by the Intervenor under its contracts with the Employer. [2]/ The Employer maintains that, in addition to Whitt, Charles Hunt, Jeff Romans and William Akers are also represented by the Intervenor. The Employer also takes the position that the only unit the Petitioner is qualified to represent consists of only two employees who perform sheet metal work falling into the Petitioner's traditional craft jurisdiction. The Petitioner and the Intervenor agree that these two employees are not represented by the Intervenor and should be appropriately included, along with the other unrepresented construction employees, in the residual unit. In addition, the Employer maintains that the broader residual unit sought by the Petitioner is not appropriate because it consists of employees who perform the same work, under the same conditions and supervision, as employees the Intervenor represents to such an extent that the residual group cannot constitute a separate appropriate unit. The Employer, therefore, argues that because the employees claimed by the Intervenor share such a close community of interest with employees sought by the Petitioner, the employees cannot be grouped into separate units for purposes of collective bargaining and to do so would render each unit inappropriate.

[2]/ The transcript is hereby corrected to reflect that comments attributed to the Employer's counsel at page 261 were actually made by the Intervenor's counsel.

The record discloses that the employees represented by the Intervenor perform construction, installation and repair work on plumbing [3]/ and HVAC (heating, ventilating and air conditioning) systems. The employees in the residual unit sought by the Petitioner, as well as the employee represented by the Laborers, also perform work on plumbing and/or HVAC systems. Five employees represented by the Intervenor are covered under the heavy commercial agreement between the Employer and the Intervenor. Another five of the Employer's employees are represented by the Intervenor under the MES agreement and its light commercial/residential addendum. Of these five employees, two perform primarily HVAC work, one performs mixture of HVAC and plumbing work, one is a residential plumber and another primarily operates a backhoe to dig ditches for the laying of pipe. Two of these employees are assigned service trucks. These five employees are supervised by Frank Ferguson, president, when making service calls and by Leonard Wright, project manager, at other times. The employee represented by the Laborers is a residential plumber who is assigned a service truck.

Of the eight unrepresented employees, two perform mostly HVAC work, one is a sheet metal fabricator, one is a sheet metal installer, one is a mechanic/helper and another three are helpers. Two are assigned service trucks. All of these employees are supervised by Frank Ferguson when making service calls and by Wright at other times. The helpers perform such tasks as roofing, operating a backhoe, digging ditches and assisting plumbers and HVAC employees, including those represented by the Intervenor. The unrepresented employees work together with the represented employees at the Employer's various light commercial projects and all employees are subject to be assigned any available work regardless of the type.

Inasmuch as the unrepresented employees work together with represented employees performing the same type of work under the same supervision and given the widely varied job functions of the unrepresented employees, I conclude, in agreement with the Employer, that the unrepresented employees do not share a community of interest separate and distinct from the represented employees. Under such circumstances, I must now determine whether the residual unit sought by the Petitioner is appropriate.

In *Carl Buddig and Company*, 328 NLRB No. 139 (1999), the Board held that when a petition is filed seeking unrepresented employees in a workforce which includes represented employees, it must first be determined whether the petitioned-for employees share a separate and distinct community of interest apart from the represented employees such that they could constitute a separate appropriate unit. If the petitioned-for employees, as here, would not constitute a separate appropriate unit if all employees were unrepresented, it must be determined whether the unrepresented employees constitute an appropriate residual unit. A residual unit is appropriate if it includes all unrepresented employees of the type covered by the petition. *Fleming Foods, Inc.*, 313 NLRB 948, 949 (1994); *Carl Buddig and Company*, supra. Accordingly, inasmuch as the Petitioner is seeking to represent all of the Employer's unrepresented construction employees, I find that the residual unit sought by the Petitioner is appropriate for purposes of collective bargaining. *Carl Buddig and Company*, supra. In

[3]/ The term "plumbing" as used here is not intended as a reference to the Intervenor's craft jurisdiction. It is intended to mean generally work involving piping and fixtures for the transmission of liquids and gasses.

reaching this conclusion, I note that the Employer has not cited any Board precedent in support of its position that the residual unit sought by the Petitioner is inappropriate.

The Employer also contends that the Petitioner is qualified to represent only those employees performing sheet metal work within its traditional craft jurisdiction. At the hearing, the Employer sought to introduce the Petitioner's constitution and by-laws, as well as testimony, to show that the Petitioner has not historically represented, and cannot represent, the type of employees it seeks to represent in this proceeding. The Employer was permitted to state its position by way of an offer of proof. Assuming the accuracy of the Employer's offer of proof that the Petitioner's constitution, by-laws and historic practice precludes it from representing certain of the petitioned-for employees, under well settled Board principles, such a constitutional prohibition or historical practice does not bar proceeding on the petition. Thus, the Board has consistently held that it is a labor organization's "willingness, rather than its constitutional ability," to represent employees "which is the controlling factor." *Mayfield Industries, Incorporated*, 126 NLRB 223, 224 (1960); *Mariah, Inc.*, 322 NLRB 586 (1996). Here, the Petitioner has expressed its willingness to represent the employees in issue. Moreover, it is clear that the residual unit sought by the Petitioner is appropriate. *Carl Buddig and Company*, supra.

Finally, the Employer's contention in its brief that a unit of all unrepresented employees is inappropriate because it could result in conflicting claims for work is without merit. The Board has traditionally held that "certifications are not granted to unions on the basis of specific work tasks, types of machines operated or union jurisdictional claims" but are issued on the basis of employee classifications performing related work functions under a community of interest analysis. *Ross-Meehan Foundries*, 147 NLRB 207 (1964); *Mariah, Inc*., supra.

Based on the foregoing, the entire record and careful consideration of the arguments of the parties at the hearing and in the briefs of the Employer and Petitioner, I find that the residual unit of all unrepresented construction employees is appropriate for purposes of collective bargaining. *Carl Buddig and Company*, supra. Accordingly, I shall direct an election among the employees in such unit.

There remains for consideration the unit placement of certain of the unrepresented employees. Initially, it is undisputed, and I find, that Darrell Ferguson, Rodney Young, Chuck Rowe, Leroy Mohr, Shannon McClong, Larry Lunsford, Brian Meek, Bill Bruce, Dave Edwards and Ron Litchfield are currently represented by the Intervenor. Accordingly, I shall exclude them from the residual unit found appropriate.

The parties disagree, as detailed above, on the unit placement of Charles Hunt, Jeff Romans, Mark Whitt and Bill Akers. The Employer asserts that all four of these employees are represented by the Intervenor. On the other hand, the Petitioner claims that none of them are represented by the Intervenor while the Intervenor claims to represent only Whitt. The record reflects that on August 18, 1999, the Employer and the Intervenor, pursuant to Section 8(f) of the Act, entered into a collective-bargaining agreement covering a portion of the Employer's workforce. By letter dated August 20, 1999, the Employer recommended to the Intervenor that the contract be extended to cover five additional employees including Hunt, Romans and Whitt. The Intervenor agreed to include two of the named employees but not Hunt, Romans and Whitt. The record does not contain any evidence that either the Employer or the Intervenor ever

contemplated placing Akers under coverage of any of the Intervenor's contracts with the Employer. Under these circumstances, I conclude that Hunt, Romans, Whitt and Akers are not represented by the Intervenor and, in agreement with the Petitioner, I shall include them in the residual unit found appropriate. These four employees are construction employees with a community of interest with the other unrepresented employees. [4]/

The parties stipulated, the record reflects and I find that Frank Ferguson, president; Stacy Wherle, project manager; Leonard Wright, project manager; and Carol Boothe, office manager; are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit.

The parties stipulated, the record reflects and I find that Stacy McSwirley, Diane Spradling and Jan (unknown) are office clerical employees. I shall, therefore, exclude them from the unit.

Inasmuch as the Employer is engaged in the construction industry, pursuant to the Board's general policy, I shall establish a formula for determining those employees eligible to vote in the election. *Steiny and Company, Inc.*, 308 NLRB 1323, 1327 (1992); *Daniel Construction Co.*, 133 NLRB 264 (1961). Although the record does not address the use of an eligibility formula, the use of such a formula in elections involving construction industry employers is warranted unless the parties specifically agree that a formula not be used to establish eligibility. *Steiny and Company, Inc.,* supra. at 1328 fn. 16. Eligible to vote are those employees covered by the formula set forth in the Direction of Election.

Based on the foregoing, the record as a whole and after careful consideration of the arguments of the parties at the hearing and in the briefs of the Employer and the Petitioner, I find that the following unit is appropriate for the purposes of collective bargaining:

> **All unrepresented construction employees employed by the Employer at and out of its Huntington, West Virginia facility, excluding all office clerical employees, all other employees and all professional employees, guards and supervisors as defined in the Act.**

Accordingly, I shall direct an election among the employees in such unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued

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[4]/ At the hearing, the Intervenor requested that if any of the employees it claimed to represent were included in the unit, it be included on the ballot. Inasmuch as the Intervenor claims to represent Whitt, whom I have included in the unit, I shall place the Intervenor on the ballot. If the Intervenor does not wish to be included on the ballot, it can so advise me, in writing, within 10 days of the issuance of this Decision not to include its name on the ballot.

subsequently, subject to the Board's Rules and Regulations. [5]/ Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Also eligible to vote shall be all employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months preceding the eligibility date for the election or who have had some employment in that period and who have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. *Steiny and Company, Inc.,* 308 NLRB 1323, 1327 (1992); *Daniel Construction Co.*, 133 NLRB 264 (1961). Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the Sheet Metal Workers' International Association Local Union #24, AFL-CIO, or by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 521, AFL-CIO or by neither labor organization.

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB No. 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision **2** copies of an election eligibility list, containing the full names, not initials, and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **September 30, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

[5]/ Section 103.20 of the Board's Rules and Regulations requires that the Employer shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. on the day of the election. The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays and holidays.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **October 7, 1999**.

Dated at Cincinnati, Ohio this 23rd day of September 1999.

/s/ [Richard L. Ahearn]
Richard L. Ahearn, Regional Director
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